

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION

KATHRYN BAUMAN RUBENSTEIN )  
 )  
 Plaintiff, ) CIVIL ACTION NO.  
 ) 1:07cv798-MHT  
 v. )  
 )  
 BETTY JO BAUMAN, et al., )  
 )  
 Defendants. )

**MOTION TO DISMISS  
OF DEFENDANT, G. DAVID JOHNSTON**

COMES NOW the defendant, G. David Johnston, ("Johnston"), by and through its undersigned attorney, and moves the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this action against Johnston, and as grounds therefor submits the following:

1. The Federal Rules of Civil Procedure embody the concept of liberalized "notice pleading"; i.e., that a complaint need contain only a statement calculated to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002); *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 21 Law 2<sup>nd</sup> 861 (1957). As to Johnston, Plaintiff's Complaint fails to meet this minimum requirement.

2. On September 4, 2007, Plaintiff filed her original Complaint naming Johnston as a defendant, but she failed to allege a cause of action in substance against Johnston.

3. On September 10, 2007, Plaintiff filed her First Amended Complaint making a general allegation, without specificity, that Johnston, among other named defendants, "conspired to defraud and deny Plaintiff her civil rights, including due process, in Houston County Circuit Case

No. CV02-5063 and the subsequent appeal before the Alabama Court of Civil Appeals and the Alabama Supreme Court.”

4. Though not specifically cited, Plaintiff is presumably alleging violation of Federal Section 1983. Plaintiff has to make a *prima facie* case that the act or omission alleged deprived Plaintiff of a right, privilege or immunity to which she is entitled under the Constitution or laws of the United States and that said act or omission was done by the person acting under color of law. *Marshall County Board of Education v. Marshall*, 992 F.2d 1171, 1174-1175 (11<sup>th</sup> Cir. 1994).

5. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a plaintiff make a short and plain statement of a claim showing entitlement to relief. See, *Hamilton v. Allen-Bradley Co.*, 217 F.3d 1321, 1325 (11<sup>th</sup> Cir.2000) (“[T]he form of the complaint is insignificant, even if it fails to categorize correctly the legal theory giving rise to the claim, **so long as the complaint alleges the facts on which relief can be granted.**”); and *Roe v. Aware Woman Center for Choice, Inc.*, 253 F.2d 678, 683-684 (11<sup>th</sup> Cir.2001) ([W]hile notice pleading may not require that the pleader allege a ‘specific fact’ to cover every element or allege ‘with precision’ each element of a claim, **it is still necessary that a complaint ‘contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.’**”).

6. An examination of the allegations set forth in Plaintiff’s “Causes of Action” reveals that the Plaintiff alleges no specific facts as to the alleged fraud perpetrated upon her by Johnston and the other named defendants nor any facts which meet the criteria for prosecuting a Section 1983 action. Thus, Plaintiff’s Complaint fails to satisfy the even the minimal standard set by Rule 8(a)(2) insofar as this Defendant is concerned.

7. Rule 8(a)(3) requires that a complaint also contain “a demand for judgment for the relief the pleader seeks.” See, *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11<sup>th</sup> Cir.1993)

(“This requirement is not arduous - ‘any concise statement identifying the remedies and the parties against whom relief is sought will be sufficient,’ citing CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1255 at 366 (2d ed. 1990)).

8. Again, Plaintiff’s “Prayer for Relief” in the original Complaint makes no demand for relief as to Johnston or even a reference to Johnston. Plaintiff’s general demand for damages in her original Complaint “against the Defendants” is insufficient to satisfy the requirement of Rule 8(a)(3), particularly since Johnston is not one of the “Defendants” identified in her “Causes of Action.”

9. Plaintiff also seeks a declaratory judgment that Defendants violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Though interwoven with the Section 1983 allegations, there are no facts to support her allegations.

10. Plaintiff has become a vexatious litigant, filing numerous frivolous and meritless lawsuits in state and federal courts against attorneys, judges, law enforcement officers and anyone who testifies or makes an appearance in or presides over any of the actions which she files. The case at bar is another example of costly litigation brought without merit and with complete disregard for the integrity of the court system. Johnston intends to seek attorney’s fees and costs if the Court grants this Motion to Dismiss.

11. In ruling on a Fed.R.Civ.P. Rule 12(b)(6) motion, “[d]ismissal is appropriate where it is clear the plaintiff can prove no set of facts in support of the claims in the complaint.” *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1308 (11<sup>th</sup> Cir. 2006). In this case, because the Plaintiff did not plead any facts in support of a viable claim against Johnston or request any relief against Johnston, she failed to comply with the requirements of Fed.R.Civ.P. 8(a) and her Complaint is fatally flawed. Unquestionably, this Motion to dismiss Johnston as a defendant in this case pursuant to Fed.R.Civ.P 12(b)(6) for Plaintiff’s failure to state a claim against Johnston is due to be granted.

Respectfully submitted this 21st day of September, 2007.

/S/ William W. Hinesley  
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/EMF system which will serve notification of such filing on the following:

None

I further certify that I have served the following by placing a copy thereof in the United States Mail, postage prepaid and properly addressed:

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